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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/178,840	10/26/1998	ANGELIKI OSTE TRIANTAFYLLOU	P/2432-19	5038
2352	7590	12/19/2001	EXAMINER	
OSTROLENK FABER GERB & SOFFEN 1180 AVENUE OF THE AMERICAS NEW YORK, NY 100368403			SHERER, CURTIS EDWARD	
			ART UNIT	PAPER NUMBER
			1761	
			DATE MAILED: 12/19/2001	

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Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. <b>09/178,840</b>	Applicant(s) <b>Triantafyllou</b>
	Examiner <b>Curtis E. Sherrer</b>	Art Unit <b>1761</b>

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)  Responsive to communication(s) filed on Nov 14, 2001

2a)  This action is FINAL. 2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

**Disposition of Claims**

4)  Claim(s) 1-9, 11-14, and 21-25 is/are pending in the application.

4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-9, 11-14, and 21-25 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

11)  The proposed drawing correction filed on \_\_\_\_\_ is: a)  approved b)  disapproved.

12)  The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. § 119**

13)  Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

a)  All b)  Some\* c)  None of:

1.  Certified copies of the priority documents have been received.
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\*See the attached detailed Office action for a list of the certified copies not received.

14)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

**Attachment(s)**

15)  Notice of References Cited (PTO-892)

18)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_

16)  Notice of Draftsperson's Patent Drawing Review (PTO-948)

19)  Notice of Informal Patent Application (PTO-152)

17)  Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_

20)  Other: \_\_\_\_\_

**Part III DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

2. Claims 1-9, 11-14, 21-25 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for reducing beta-glucanase by heating, does not reasonably provide enablement for reducing said enzyme by any other means. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to practice the invention commensurate in scope with these claims. Applicant so not disclose a method for reducing the beta-glucanase activity by any other means except by heating.

***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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4. Claims 1-9, 11-14 and 21-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kong et al (CN Pat. No. 1065488) in view of Lindahl (WO95/07628).

5. Kong et al teach that cited in the last Office Action but do not teach the use of a "treated" cereal product that lack beta-glucanase activity.

6. Lindahl et al teach the production of an oat suspension that equates to Applicant's claimed "wort." The production of the suspension is performed so as to preserve the beta-glucan by avoiding the presence of beta-glucanase. (See page 2, lines 6-20). Inherently, the Lindahl et al final product will have all the claimed attributes because the process is the same.

7. Finally, Applicants' attention is invited to *In re Levin*, 84 U.S.P.Q. 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 U.S.P.Q. 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 U.S.P.Q. 221.

8. With respect to the temperatures used to convert the starch to sugars, the addition of hops, the specific use of amylase as one of the added enzymes, the addition of yeast to ferment the wort,

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or the specific type of oats used, it is considered that these are notoriously well known to brewers and therefore their use would be obvious to those of ordinary skill in the art. Again, see *In re Levin*.

9. Lastly, with regard to the limitations directed to soluble beta glucan content, because the process is essentially the same, i.e., the use of oat grains instead of malted barley, said glucan content will inherently be the same. The Office does not have the facilities for examining and comparing Applicant's product with the product of the prior art in order to establish that the product of the prior art does not possess the same material structural and functional characteristics of the claimed product. In the absence of evidence to the contrary, the burden is upon the applicant to prove that the claimed are functionally different than those taught by the prior art and to establish patentable differences. See *In re Best*, 562 F.2d 1252, 195 U.S.P.Q. 430 (CCPA 1977); *Ex parte Gray*, 10 U.S.P.Q.2d 1922, 1923 (BPAI).

#### *Response to Arguments*

10. Applicant's arguments filed 11/05/01 have been fully considered but they are moot in view of the newly cited art.

#### *Conclusion*

11. No claim is allowed.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis Sherrer whose telephone number is (703) 308-3847. The examiner can normally be reached on Tuesday through Friday from 6:30 to 4:30. The **fax phone number** for this Group is (703)-305-3602.

13. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.



Curtis E. Sherrer  
Primary Examiner  
December 17, 2001